

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARKIUS, INC.,

Plaintiff and Appellant,

v.

CHARLES YEH, et al.,

Defendants and
Respondents.

B278568

(Los Angeles County
Super. Ct. No. BC415114)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Reversed and remanded with directions.

Moon & Dorsett, Dana M. Dorsett, and Jeremy Cook for Plaintiff and Appellant.

David M. Browne for Defendants and Respondents.

Plaintiff Arkius, Inc. moved for an award of attorney fees as the prevailing party on claims under two contracts. In their opposition papers, defendants Charles Yeh and Christine Yeh (collectively, Yeh) acknowledged both contracts provide for an award of attorney fees to the prevailing party but argued some categories of fees Arkius requested are unrecoverable and other amounts sought are unreasonable. The trial court heard oral argument from the parties regarding the amount of fees recoverable under the two contracts, and no argument regarding whether the two contracts provide for attorney fees, as the parties had expressly agreed in writing that both contracts provide for attorney fees. The court issued an order awarding Arkius a portion of the fees it requested under one contract and none of the fees it requested under the other, finding the latter contract contained no attorney fees provision. In making its decision, the court reviewed a copy of a contract attached to Arkius's first amended complaint that was missing the page with the attorney fees provision. The first time the court mentioned the no-attorney fees-provision issue was in its order granting in part and denying in part the motion.

We agree with Arkius's contention we must reverse the order because the trial court did not consider the amount of attorney fees recoverable under one of the two contracts, and we remand the matter for that determination. We reject Yeh's "invited error" argument, for the reasons explained below.

BACKGROUND

The Pleadings

In June 2009, Arkius filed this action against Yeh (and other defendants), alleging Yeh breached four construction contracts by failing to pay Arkius amounts owed under the

contracts for repairs Arkius performed at Ardmore Plaza, a commercial building owned by Yeh.¹

Under Contract No. 1, signed by the parties in October 2008, Yeh agreed to pay Arkius \$164,535 to repair damage to Ardmore Plaza caused by a fire. Contract No. 2 is a written proposal Arkius prepared in December 2008, calling for an additional \$158,382 in fire repairs. Neither party signed Contract No. 2. Yeh claimed Contract No. 2 was duplicative of the repairs already required under Contract No. 1. Arkius claimed it performed work under Contract No. 2 (an oral agreement based on the written proposal) for which Yeh did not pay. (*Arkius v. Yeh* (May 14, 2015, B248115) [nonpub. opn.], pp. 2-3.)²

In January 2009, the parties entered into two additional contracts under which Arkius agreed to repair water damage caused when it was performing roof repairs under Contract No. 1 and failed to cover the roof properly before a rainstorm. Water flooded into the building through cracks in the makeshift plywood frame Arkius installed to cover the open roof. Under Contract No. 3, signed by the parties on or about January 13, 2009, Yeh agreed to pay Arkius \$156,034 to repair a portion of the water damage. Under Contract No. 4, signed by the parties on or about January 19, 2009, Yeh agreed to pay Arkius \$51,847 to repair a

¹ The parties refer to the contracts as Contract Nos. 1-4. Only two of the four contracts are at issue in this appeal (Contract Nos. 3 and 4), as discussed below.

² We take some of the background facts from our opinion in a prior appeal in this case.

different portion of the water damage.³ Contract Nos. 3 and 4 also covered work outside the scope of the water damage repairs, including certain electrical work. (*Arkius v. Yeh, supra*, B248115, pp. 3-4.)

Arkius conceded it did not complete all work described in Contract Nos. 1, 3, and 4, but maintained it completed all work described in Contract No. 2 (an alleged oral agreement based on the written proposal). (*Arkius v. Yeh, supra*, B248115, p. 4.) In its complaint, Arkius alleged Yeh owed \$35,868 on Contract No. 1, \$158,382 on Contract No. 2, \$72,880 on Contract No. 3, and \$40,861 on Contract No. 4. Arkius also alleged Yeh was required to pay attorney fees and costs under each of the contracts. The copies of Contract Nos. 1, 2 (the written proposal), and 3 attached to the complaint include the page with the attorney fees provision. The copy of Contract No. 4 attached to the complaint (and the first amended complaint) is missing the page with the attorney fees provision. As set forth below, the record before us contains a complete copy of Contract No. 4, including the page with the attorney fees provision, and the parties have never disputed the existence of an attorney fees provision in Contract No. 4.

In July 2009, Charles Yeh and Christine Yeh each filed an answer to Arkius's complaint, and Charles Yeh filed a cross-complaint against Arkius and its principal, Pius Kim. The cross-complaint alleged cross-defendants were liable for damages for

³ According to Yeh, Arkius represented it would submit Contract Nos. 3 and 4 to its liability insurance carrier and use the money it expected to receive from the insurance company to complete the water damage repairs covered under Contract Nos. 3 and 4.

failing to perform all agreed-upon repair work at Ardmore Plaza and for negligently causing the flooding and resulting water damage by failing to cover the roof properly before a rainstorm while conducting roof repairs. On June 17, 2010, Charles Yeh, Christine Yeh and Hyundai Health Center, Inc. (Yeh's business that operated at Ardmore Plaza) entered into a release and settlement agreement with Arkius and Pius Kim under which they agreed to release all claims against Arkius and Kim in exchange for a payment of \$35,000. In June 2010, Charles Yeh dismissed with prejudice his cross-complaint against Arkius and Kim. (*Arkius v. Yeh, supra*, B248115, pp. 4-5.)

Arkius filed a first amended complaint in July 2012, revising the amount it alleged Yeh owed on Contract No. 1 from \$35,868 to \$13,629.50. The alleged amounts owed on the other three contracts remained the same.

Trial

In late 2012, a four-day court trial was held before Judge Michael P. Linfield. Arkius sought \$279,452.50 in damages: the further revised amount of \$7,329.50 on Contract No. 1, plus the amounts listed in his complaints on Contract Nos. 2-4 (as outlined above). Yeh disputed he owed Arkius any amount. (*Arkius v. Yeh, supra*, B248115, p. 6.)

In January 2013, the trial court issued its decision, awarding Arkius \$7,329.50, the amount it requested at trial on Contract No. 1. (*Arkius v. Yeh, supra*, B248115, p. 6.) The court denied Arkius any recovery under Contract No. 2, concluding Contract No. 1 already required Arkius to perform the work proposed in Contract No. 2. The court also denied recovery under Contract Nos. 3 and 4, concluding Arkius could only recover under Contract No. 1 because “the damage that was to be

repaired under Contract[] Nos. 3 and 4 was due to Arkius' negligence in completing Contract No. 1.'” (*Id.* at p. 7.)

On February 15, 2013, the trial court entered judgment in favor of Arkius and against Yeh in the amount of \$7,329.50, plus attorney fees and costs subject to proof.

In April 2013, Arkius moved for attorney fees as the prevailing party in the action. In its motion, Arkius stated it had incurred \$261,347.33 in attorney fees but requested 40 percent of that amount, or \$104,539.93, for work associated with its successful claims on Contract No. 1. The trial court (Judge Linfield) awarded Arkius 25 percent of the total fees it claimed to have incurred, or \$65,336.83.

Defendant Hyundai Health Center also moved for attorney fees in April 2013, and the trial court awarded it \$14,000 as the prevailing party because it successfully defended all of Arkius's claims. Counsel's declaration in support of the motion states, in pertinent part: "Attached hereto as Exhibit 'A' is the one page from contract no. 1 that contains the form language authorizing attorneys fees for the prevailing party (paragraph 4 under Terms and Conditions). *The same clause appears in all four contracts at issue in this case.* The same clause forms the basis for [Arkius]'s motion for attorney fees as to the Yeh defendants. *None of the parties dispute that the contract provisions awards [sic] attorneys fees to the prevailing party.*" (Italics added.) The same attorney who wrote that declaration represented Yeh below in connection with Arkius's current motion for attorney fees and continues to represent Yeh in this appeal.

Appeal

Arkius and Yeh both appealed the judgment. Arkius contended the trial court erred in declining to award it money

under Contract Nos. 2, 3, and 4, and Yeh contended the trial court erred in awarding Arkius any money at all. (*Arkius v. Yeh, supra*, B248115, p. 2.) In an opinion issued May 14, 2015 (which we cite throughout this opinion), we affirmed the portions of the judgment related to Contract Nos. 1 and 2 and reversed the portions of the judgment related to Contract Nos. 3 and 4. (*Id.* at p. 12.) We concluded the trial court erred in allowing Yeh to assert as an affirmative defense to Arkius’s claims for payment under Contract Nos. 3 and 4 that Arkius caused the water damage and therefore could not recover under Contract Nos. 3 and 4 at all. We explained: “First, Yeh signed Contract Nos. 3 and 4 and agreed to pay for the work, knowing that Arkius had caused the water damage. Second, Contract Nos. 3 and 4 covered some work outside the scope of the water damage repair (e.g., electrical work). Third, Yeh already had brought a negligence claim against Arkius in a cross-complaint, seeking damages resulting from Arkius’s failure to cover the roof properly. Yeh accepted a payment from Arkius in exchange for the settlement and release of all claims in Yeh’s cross-complaint and all other known or unknown claims arising out of Arkius’s work at Ardmore Plaza. Yeh dismissed the cross-complaint with prejudice.” (*Id.* at p. 9.) We remanded the matter for further proceedings on Contract Nos. 3 and 4. (*Id.* at p. 12.)

Post-Appeal Proceedings and Settlement

After the matter was remanded, Arkius filed an affidavit of prejudice under Code of Civil Procedure section 170.6 against Judge Linfield, and the matter was reassigned to Judge Barbara A. Meiers.

On December 3, 2015, the trial court issued an order severing the causes of action in Arkius’s first amended complaint

related to Contract Nos. 1 and 2 from the causes of action related to Contract Nos. 3 and 4 and entered judgment in favor of Arkius for \$109,915.69: \$7,329.50 (the damages awarded on Contract No. 1), plus post-judgment interest on that amount of \$2,016; \$65,336.83 in attorney fees, plus post-judgment interest on that amount of \$12,086; and \$19,568.36 in costs, plus post-judgment interest on that amount of \$3,579.

On March 11, 2016, the parties filed a notice of settlement, informing the trial court they had settled Arkius's causes of action related to Contract Nos. 3 and 4 on the following terms, among others: (1) Yeh agreed to pay Arkius \$35,000 (the same amount Arkius had paid Yeh to settle the cross-complaint), (2) Arkius was deemed the prevailing party on Contract Nos. 3 and 4, and (3) Arkius would file a motion for attorney fees because the parties could not reach an agreement on the amount of fees Arkius should recover under Contract Nos. 3 and 4.

Current Motion for Attorney Fees

On May 10, 2016, Arkius filed the current motion for attorney fees, seeking an award of \$378,158.67 for fees incurred before the appeal referenced above, for fees incurred while the matter was on appeal, and for fees incurred after remand, related to the claims under Contract Nos. 3 and 4. Arkius attached its attorney's billing statements to the motion, but did not attach Contract Nos. 1-4.

Yeh filed an opposition, acknowledging the "settlement agreement did provide that [Arkius] would be viewed as the prevailing party, and it is not disputed that the contractual matters at issue [Contract Nos. 3 and 4] provide for the prevailing party to be awarded reasonable attorney's fees." Yeh added, "What is at issue is the amount recoverable given the

events in this case.” Yeh argued Arkius’s requests for attorney fees incurred before the appeal and while the matter was on appeal were untimely, and the amounts sought for the appeal and post-appeal proceedings were “grossly unreasonable.”

On June 21, 2016, the trial court ordered Arkius to revise its motion for attorney fees because it sought amounts the court deemed unrecoverable, such as fees it incurred while challenging lien proceedings by its former attorney. On July 6, 2016, Arkius filed an amended motion, seeking \$219,330 in attorney fees.

On August 10, 2016, the trial court heard oral argument regarding the amount of attorney fees Arkius should recover under Contract Nos. 3 and 4. There was no discussion about whether there was an attorney fees provision in Contract No. 4 because it was undisputed that there was, as stated in Yeh’s opposition to the motion (and quoted above).

On August 25, 2016, the trial court issued a 19-page ruling, awarding Arkius \$7,000 in attorney fees under Contract No. 3 and denying fees under Contract No. 4. The court stated it had reviewed the copy of Contract No. 4 attached to the first amended complaint, and it did not contain an attorney fees provision. The court noted, “Unfortunately, one has to wonder what the course of this action would have been had the parties noted and realized from the outset that there were no fees available on the prosecution of claims under ‘contracts’ two [the unsigned proposal] and four. The presence or absence of attorney fee provisions may often serve to either put more emphasis on a prompt resolution of a case or lead to excessive litigation.”

DISCUSSION

Arkius contends we must reverse the order granting in part and denying in part its motion for attorney fees because the trial

court did not consider the amount of attorney fees recoverable under Contract No. 4.

The parties have never disputed Contract No. 4 includes a provision allowing the party prevailing on claims under the contract to recover attorney fees. The record before us includes a copy of Contract No. 4, including the page with the attorney fees provision.⁴

Yeh argues Arkius is estopped from seeking reversal on this basis because it “invited” the error in that it “never presented any evidence to the court that” Contract No. 4 had an attorney fees provision and, “after receiving the ruling, Arkius never did anything to correct this alleged error.”

“The invited error doctrine is an application of the estoppel principle that where a party by his or her conduct induces the commission of error, he or she is estopped from asserting it as a ground for reversal on appeal. [Citation.] However, ‘the invited error doctrine requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party.’” (*Pioneer Construction, Inc. v. Global Investment Corp.* (2011) 202 Cal.App.4th 161, 169.) Here, the trial court’s error was not a result of a deliberate tactical choice by Arkius.

Although Arkius did not attach a copy of Contract No. 4 to its motion for attorney fees, both parties stated in their papers on the motion that there was no dispute that Contract Nos. 3 and 4

⁴ Yeh submitted this complete copy of Contract No. 4 to the trial court in August 2010 in connection with a motion for attorney fees it made after it successfully moved for nonsuit against Arkius. The nonsuit was later reversed in an appeal not germane to the matter before us. (*Arkius Inc. v. Hyundai Health Center, Inc.* (Sept. 27, 2011, B228093) [nonpub. opn.])

provided for attorney fees to the prevailing party. No one, including Judge Meiers, addressed the existence (or purported nonexistence) of the attorney fees provision during oral argument on the motion. The first time this issue was raised was in the written ruling on the matter, after the trial court reviewed a copy of Contract No. 4 attached to the first amended complaint that was missing the page with the attorney fees provision. Arkius did not point the court to this copy of the contract in its motion for attorney fees.

Arkius appealed from the order granting in part and denying in part its motion for attorney fees, challenging not only the lack of an award of fees under Contract No. 4 but also the amount of the award under Contract No. 3. While Arkius might have saved the parties time and money and conserved judicial resources if it had raised the issue regarding Contract No. 4 in the trial court after the ruling (e.g., by motion for clarification), Arkius was not required to do so before filing an appeal.

Arkius also challenges on several grounds the amount of attorney fees the trial court awarded under Contract No. 3. We cannot review these additional contentions at this juncture because the trial court's mistaken finding that attorney fees were not available under Contract No. 4 affected the amount of attorney fees it awarded under Contract No. 3. For example, the court declined to award fees for legal services performed prior to the appeal, finding Judge Linfield's 2013 fee order was "generous" in awarding 25 percent of the total fees Arkius incurred where only two of the four contracts (Nos. 1 and 3) provided for attorney fees. The court also found no attorney fees were recoverable for the pre-appeal period under Code of Civil Procedure section 1033 because Arkius only recovered \$17,500 on

Contract No. 3 (half of its total recovery on Contract Nos. 3 and 4), an amount “within the jurisdiction of a limited jurisdiction court.” (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 976 [under Code of Civil Procedure section 1033, subdivision (a), a trial court has discretion to deny attorney fees to a plaintiff who prevails on a claim “but recovers an amount that could have been recovered in a limited civil case”].) Regarding attorney fees for legal services incurred on appeal and in post-appeal proceedings, the court found Arkius’s “request as being overall extremely excessive, and even more so given that the request ought to have been made only as to contract three.”

Accordingly, we remand the matter for the trial court to determine the amount of attorney fees Arkius should recover under Contract Nos. 3 and 4, in light of the fact that both contracts provide for attorney fees.

DISPOSITION

The order granting in part and denying in part Arkius’s motion for attorney fees is reversed and the matter remanded for a determination of the amount of attorney fees Arkius should recover under Contract Nos. 3 and 4. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.